Supreme Court, U.S.
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No. 00-454

In The

Supreme Court of the United States

ATKINSON TRADING COMPANY, INC.,

Petitioner,

v.

JOE SHIRLEY, JR., VICTOR JOE, DERRICK B. WATCHMAN, and ELROY DRAKE, MEMBERS of the NAVAJO TAX COMMISSION; and STEVEN C. BEGAY, Executive Director of the Navajo Tax Commission,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF AMICUS CURIAE STATES OF SOUTH DAKOTA, ALABAMA, COLORADO, FLORIDA, MICHIGAN, MISSISSIPPI, MONTANA, UTAH AND WYOMING IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THE COURT BELOW FAILED TO APPLY THE STANDARDS ESTABLISHED BY THIS COURT IN *STRATE* AND *MONTANA* REGARDING THE APPLICATION OF TRIBAL CIVIL JURISDICTION OVER NONMEMBERS FOUND ON NONTRIBAL LAND IN RESERVATIONS 4

II. THE DECISION BELOW HAS THE POTENTIAL TO SERIOUSLY DISRUPT APPLICATION OF *MONTANA* PRINCIPLES OUTSIDE THE TAXATION CONTEXT 10

III. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE DIRECT CONFLICT WITH THE NINTH CIRCUIT 12

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

Big Horn Electric Cooperative v. Adams, 219 F.3d 944 (9th Cir. 2000) 12

Bugenig v. Hoopa Valley Tribe, No. 99-15654, 2000 U.S. App LEXIS 24746 (9th Cir. Oct. 3, 2000) 11

Carmichael v. Southern Coal & Coke Co., 301 U.S. 495 (1937) 8

Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989) 12

El Paso Nat. Gas Co. v. Neztsosie, 526 U.S. 473 (1999) 5

Hagen v. Utah, 510 U.S. 399 (1994) 11

Lincoln v. Vigil, 508 U.S. 182 (1993) 12

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) 12

Montana v. United States, 450 U.S. 544 (1981) .... *passim*

Negonsott v. Samuels, 507 U.S. 99 (1993) 12

Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995) 11

Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (1991) 12

Oklahoma Tax Comm'n v. Sac and Fox Nation, 508 U.S. 114 (1993) 12

South Dakota v. Bourland, 508 U.S. 679 (1993) 4

Strate v. A-1 Contractors, 520 U.S. 438 (1997) ..... *passim*

Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980) 12

TABLE OF AUTHORITIES – Continued

Page

STATUTORY REFERENCES

Mont. Code Ann § 18-11-103(1)(b)(1999) 1

S.D. Codified Laws Ann. §§ 10-12A-1 et seq 1

OTHER REFERENCES

S. Ct. R. 37.2 1

INTRODUCTION

The States of South Dakota, Alabama, Colorado, Florida, Michigan, Mississippi, Montana, Utah and Wyoming through their respective Attorneys General, respectfully submit a brief Amicus Curiae pursuant to S. Ct. R. 37.2 in support of the Petition for Writ of Certiorari.

INTEREST OF AMICI CURIAE

Each State appearing as an amicus curiae contains one or more Indian reservations created under federal law. As a result of subsequent federal legislation, however, substantial amounts of reservation land are now owned in fee by nonmembers and by the federal, state, and local governments.

Each amicus State shares an interest in being able to predict, with some measure of certainty, the scope of tribal taxation authority. Not only will this knowledge aid in the avoidance of conflict, but it will allow the States to fashion their own policies to integrate state and tribal taxation authority in ways beneficial to both. *See, e.g.*, S.D. Codified Laws Ann. §§ 10-12A-1 et seq. (allowing agreements between state and tribes to collect tribal taxes); Mont. Code Ann § 18-11-103(1)(b) (1999) (authorizing public agency to enter into state-tribal agreements). Each State also faces the even more daunting task of determining the legal and appropriate extent of tribal jurisdiction generally with regard to non-Indians on reservations and the decision below undermines the finely tuned rules developed by this Court.

SUMMARY OF ARGUMENT

In *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), and *Montana v. United States*, 450 U.S. 544 (1981), this Court established a bright-line rule with regard to the issue of whether a tribe could exercise civil regulatory authority over nonmembers on nontribal land within a reservation. The cases set out a "main rule" that absent contrary congressional direction, a tribe lacks civil authority over the conduct of nonmembers on land within a reservation to which the tribe has lost "gatekeeping" power. The Court has identified two exceptions to the main rule: A tribe may have civil regulatory jurisdiction over a nonmember on fee land who enters into consensual relationships with a tribe or its members or who engages in activity directly affecting the tribe's political integrity, economic security, health, or welfare. *Strate* and *Montana* thus establish a strong presumption *against* civil tribal authority with regard to nonmembers on non-Indian land within the reservation; the presumption can, however, be overcome by proof of one of the two exceptions.

The rule carefully drawn in *Strate* and *Montana* is radically undermined by the decision below. The court of appeals flatly rejected the thesis that the nontribal status of land was a critical lynchpin of *Montana* and *Strate*, characterizing such status as a mere "coincidence" Pet. App. 15a-16a or "simply one factor", *id.* at 16a, to be considered in determining the existence of inherent tribal authority. Moreover, in place of the carefully wrought test developed by this Court, the Tenth Circuit adopted a "balancing test" relating to the status and conduct of the nonmembers, the "nature" of the sovereign powers at issue and the impact of the nonmember conduct on the

tribe's power. The accounting of land status either falls within this test "or becomes secondary," according to the Tenth Circuit. *Id.* at 25a.

The decision below, moreover, aggravated its misinterpretation of *Montana* by adopting an extremely broad theory of implied consent to tribal jurisdiction. Under the Tenth Circuit's opinion, a nonmember impliedly consented to tribal civil jurisdiction merely by entering onto a reservation by way of a state highway for the purpose of spending a night at a non-Indian hotel on non-Indian land. *Id.* at 26a-30a. The Tenth Circuit further found that the tax in question could be applied because it was not "disproportionate" to the benefits received by the non-Indian. *Id.* at 30a-32a. In practical effect, the court of appeals' decision elevates the first, or consent, exception in *Montana* to controlling significance and, in practical effect, replaces the main rule's presumption against tribal authority with one in favor of such authority unless the particular regulation is deemed "disproportionate."

Certiorari review is thus essential to ensure that the doctrinal coherence of *Montana*'s "pathmarking" analysis is maintained. Absence of immediate review, we believe, will serve only to foment jurisdictional controversy over the full range of civil inherent authority in Indian country within the Tenth Circuit and beyond – conflict that can be avoided by disabusing the court below of its errant reconfiguration of *Montana*'s main rule and the consent exception.

ARGUMENT

I

THE COURT BELOW FAILED TO APPLY THE STANDARDS ESTABLISHED BY THIS COURT IN *STRATE* AND *MONTANA* REGARDING THE APPLICATION OF TRIBAL CIVIL JURISDICTION OVER NONMEMBERS FOUND ON NONTRIBAL LAND IN RESERVATIONS.

A. In *Montana v. United States*, 450 U.S. 544, 565 (1981), this Court determined that the "inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." The Court identified two exceptions to that general rule. First, a tribe may retain inherent sovereign authority over non-Indians on reservations "even on non-Indian fee lands," and "may regulate, through taxation, licensing or other means, the activities of nonmembers who enter *consensual relationships* with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Id.* (emphasis supplied). In addition, the Court found that a tribe may retain inherent sovereign power "over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566; *see also South Dakota v. Bourland*, 508 U.S. 679, 695-696 (1993) (reaffirming *Montana* standards in the context of public lands on the reservation, and remanding for a decision on whether either of the "two exceptions" to that general principle applied).

In *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), the Court dispelled all doubt as to the central position of the *Montana* test. *Strate* identifies *Montana* as the "pathmarking case concerning tribal civil authority over nonmembers." *Id.* at 445. Under *Strate*, the analysis in *Montana* sets out a "main rule," *id.* at 453, or a "general rule," *id.* at 446, providing that, absent contrary congressional direction, "Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation, subject to two exceptions: The first exception relates to nonmembers who enter consensual relationships with the tribe or its members; the second concerns activity that directly affects the tribe's political integrity, economic security, health, or welfare." *Id.* This Court continued on to emphasize the land-based nature of tribal jurisdiction: "Regarding activity on non-Indian fee land within a reservation, *Montana* delineated – in a main rule and exceptions – the bounds of the power tribes retain to exercise 'forms of civil jurisdiction over nonmembers.' " *Id.* at 453.

One of the primary holdings in *Strate* – that a state highway right-of-way should be treated as nontribal land for the purpose of a *Montana* analysis – unambiguously reflected the central nature of the land-status inquiry with regard to the *Montana* analysis. *Id.* at 456 ("We therefore align the right-of-way, for the purpose at hand, with land alienated to non-Indians. Our decision in *Montana*, accordingly, governs this case"). Because *Montana* was the "controlling decision," *Strate* held that to "prevail" the "petitioners must show that . . . tribal-court action against nonmembers qualifies under one of *Montana*'s two exceptions" (*id.*), a burden they failed to carry. *See El Paso Nat. Gas Co. v. Neztsosie*, 526 U.S. 473, 482 n.4 (1999) (distinguishing *Strate* because it "dealt with claims

against nonmembers arising on state highways, and 'express[ed] no view on the governing law or proper forum when an accident occurs on a tribal road within a reservation' ").

B. That *Montana* set out a main rule – a presumption against tribal jurisdiction over nonmember activity on fee lands which can only be overcome by demonstrating the existence of one of two limited exceptions – warrants no further discussion. The court of appeals, however, effectively *rejects* the bright-line test of *Montana* and *Strate*, finding unpersuasive the contention that, under *Montana*, "fee status should become the determining factor in cases involving the assertions of tribal sovereign power over nonmembers on the reservation" (Pet. App. 11a) and opining that "[f]ee status is largely inconsequential in this case" (*id.* at 20a n.11). To the court below, "the status of the land involved as fee land or tribal land is simply one of the factors a court should consider when determining whether a tax on nonmember activity on the reservation falls within the civil jurisdiction of the tribe." *Id.* at 19a-20a. The court of appeals then departed from this Court's jurisprudence by adopting a refinement of the district court's "balancing test," *id.* at 14a, that focuses on two factors:

> (1) the status and conduct of the nonmembers and (2) the nature of the inherent sovereign powers the tribe is attempting to exercise, its interests, and the impact that the exercise of the tribe's powers has upon the nonmember interests involved. Any accounting of fee status either falls into the Court's study of these factors or becomes secondary.

Id. at 25a. The mischief wrought by this new "balancing test" is palpable.[1]

Aside from an abject failure to recognize and give effect to the plain holdings in *Montana* and *Strate*, the court of appeals has introduced into the sensitive area of tribal civil adjudicatory and regulatory authority a standard that makes infeasible a reasoned assessment of such authority's scope by States, tribes and individual nonmembers. Its "balancing test" thus subjects any determination with respect to the ability of a tribe to regulate nonmember activity to a highly subjective analysis by the federal courts. There can be no doubt that the injection of these novel principles into federal Indian law will lead, in

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[1] To the extent the court of appeals relied upon *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), and *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), that reliance was unjustified for the reasons discussed by Petitioner; i.e., both cases involved the application of tribal taxes to nonmembers who were doing business on tribal lands with either a tribe or a tribal outlet. Pet. 13-14. Neither factor is involved here. The court of appeals also devoted substantial attention to *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906). *Buster*, while involving application of tax on trading within tribal territory against nonmembers who conducted business on their own lands, was decided against a unique statutory background and the conclusion that an 1896 law providing for the sale of townsites did not divest the tribe of its inherent authority with respect to taxing business activities – a tax which existed prior to the law's passage. *Montana* and *Strate*, which represent this Court's explication of inherent authority principles, establish that where, as here, tribal "gatekeeping" power has been lost by congressional or executive action, so too has tribal inherent authority, absent the presence of a *Montana* exception.

the Tenth Circuit (and beyond if this case finds application beyond that circuit), to new rounds of vexing, divisive litigation.

C. The court of appeals compounded its error by employing the "balancing test" to reconfigure the *Montana* consent exception. It accomplished this result by, one, adopting a sweeping theory of implied consent and, two, devising a "disproportionality" standard to determine whether the scope of this implied consent was exceeded. The practical result of this analytical regime is evisceration of the presumption against the existence of tribal inherent authority over nonmembers with respect to nontribal land activities.

1. The court of appeals held that a nonmember who enters a reservation using federal or state highways and stays at a nonmember-owned hotel located on nonmember fee land *impliedly* consents to tribal jurisdiction with respect to that transaction. The court predicated its holding on factual findings by the Navajo Tax Commission concerning "the extent of police, fire, emergency medical, and tourist services provided by the tribe to benefit [Petitioner] and its guests at the Trading Post." Pet. App. 27a. Since virtually all tribes will be positioned to argue that they contribute, either directly or indirectly, to "the privileges of living in an organized society" (*Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 522 (1937)), the court of appeals' reasoning compels the conclusion that consent to tribal regulation of *any* kind must be implied merely by entering a reservation.

The court of appeals' analysis cannot be squared with *Montana* or *Strate*. In the former case, this Court reiterated

the parameters of the consensual relationship as covering the "activities of nonmembers who enter consensual relationship with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565. It is clear that the nonmembers in this case have not entered into commercial dealing, contracts, or leases with the "tribe or its members." The court below found in effect that the term "other arrangements" included the act of driving on a nontribal road to a nonmember hotel on nonmember land within the reservation. However, those acts are, as *Strate* observed in an entirely comparable context, " 'distinctly non-tribal in nature.' " 520 U.S. at 457. To credit the Tenth Circuit's theory is to overrule *Strate* sub silentio.[2]

2. The court of appeals, in its final embellishment of the *Montana* test, held that once consent had been established, a regulation in the form of a tax can be imposed, provided the regulation is "not disproportionate to the benefits" received. Pet. App. 32a. It premised this conclusion on the amount of the tax – 8 percent – which the district court had found within the range of similar taxes

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[2] Indeed, this Court rejected a previous attempt to use implied consent to establish tribal jurisdiction. In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 193 n.2 (1978), the Court noted that there were signs at the entrances to the reservation advising that entry onto the reservation "would be deemed implied consent to the criminal jurisdiction of the Suquamish tribal court." Although the Court did not address the signs' significance in the opinion, it is plain that consent to tribal jurisdiction cannot be implied on the basis of conduct that, in itself, does not fall within the scope of the commercial or other contract-based activity referred to in *Montana*'s description of the first exception.

imposed by States or their political subdivisions – and the fact that the tax "is used in ways that appropriately benefit the taxpayers." *Id.* It is difficult to discern meaningful limits on a tribe's authority under this sort of reasoning, since it will be the very unusual tax or other regulation that cannot be said to benefit the nonmember in some fashion. The implied consent rationale thus could be used by a tribe to impose a speed limit on a nonmember using a state road through the reservation on the ground that tribal services in connection with such regulation "appropriately benefit" the drivers by reducing excessive motor vehicle speeds and increasing highway safety. In sum, the first "exception" swallows the "main rule" under the Tenth Circuit's approach which effectively replaces the presumption against tribal jurisdiction with a rule that presumes the existence of inherent authority absent a disproportionality finding.

II

THE DECISION BELOW HAS THE POTENTIAL TO SERIOUSLY DISRUPT APPLICATION OF *MONTANA* PRINCIPLES OUTSIDE THE TAXATION CONTEXT.

Although the litigation at issue involves a tribal tax, the principles at stake extend far beyond that issue. The logic of the court of appeals' decision, as indicated by the motor vehicle speed regulation hypothesized above, applies to *any* exercise of civil regulatory authority over nonmembers with respect to activities on their own property or other lands as to which a tribe has lost gatekeeping power. A salient, and actual, example of the disruption in Indian law promised by the decision below

emerges from the recently decided *Bugenig v. Hoopa Valley Tribe*, No. 99-15654, 2000 U.S. App. LEXIS 24746 (9th Cir. Oct. 3, 2000).

In *Bugenig*, the tribe attempted to impose a land use restriction on a small plot of nonmember-owned land. To determine whether the tribe could exercise jurisdiction, the court invoked the "general proposition" of *Montana* and the "two narrow exceptions." 2000 U.S. LEXIS 24746, at *23. As to the consent exception, the court noted that the tribal court below had concluded that the "first exception was inapplicable in light of the absence of any significant consensual relationship between Bugenig and the Tribe." *Id.* at *24 n.6. The court of appeals also found that the second exception had not been proven. Under the Tenth Circuit's decision, however, the result would have been the opposite. The nonmember would have been deemed to have consented impliedly to tribal authority merely by residing on the reservation. The question then would have become whether the land-use regulation was "disproportionate," and little doubt exists that the court below would have answered that question negatively since governmental entities engage in myriad types of such regulation and since the regulation by the Hoopa Valley Tribe was restricted to a prohibition against logging and not other uses of the property.

It bears emphasis that the effect of the decision below cannot be minimized because its anomalous rule would be applied only in the Tenth Circuit. That circuit has a large share of Indian country which has generated a significant amount of Indian law litigation both recently and over the years. *See, e.g., Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995); *Hagen v. Utah*, 510

U.S. 399 (1994); *Lincoln v. Vigil*, 508 U.S. 182 (1993); *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114 (1993); *Negonsott v. Samuels*, 507 U.S. 99 (1993); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989).

III

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE DIRECT CONFLICT WITH THE NINTH CIRCUIT.

The Ninth Circuit decision in *Big Horn Electric Cooperative v. Adams*, 219 F.3d 944 (9th Cir. 2000), stands in irreconcilable conflict with the decision below, as the Petitioner argues. Pet. 18-25. Two points nonetheless merit brief iteration.

First, in *Big Horn* the court squarely rejected the notion that either *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980) or *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) "abrogates *Montana*'s main rule." 219 F.3d at 952. The Ninth Circuit found instead that "*Merrion* actually lends support to *Montana*'s application in this case" insofar as *Merrion* indicates that a tax on non-Indian fee land would be an impermissible extension of tribal jurisdiction. *Id.* Likewise, the Ninth Circuit deemed *Colville* to be consistent with *Montana* in that *Colville* "dicta appears to support *Montana's* conclusion that tribal taxation power over property located on non-Indian fee land is extremely narrow." *Id.* Second, *Big Horn* straightforwardly followed the *Montana* test, initially concluding that the "main rule" applied because the tribe had lost gatekeeping power

over the rights-of-way and then determining that neither exception had been proved by the tribal authority proponents. *Id.* at 950-952. The Ninth Circuit's faithful adherence to this Court's *Montana* jurisprudence contrasts with the opinion below and creates a conflict among the circuits warranting certiorari review.

CONCLUSION

For the foregoing reasons the Amici States respectfully request that this Court grant the Petition for Writ of Certiorari.

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